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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 19

EDWARD J. GARGUILO AND EDWARD VIRTUE, *Appellants*,

v.

STATE OF NEW JERSEY, *Appellee*.

JAMES HOSMER, EUGENE D. ELDRIDGE AND DONALD MURRAY, *Appellants*,

v.

STATE OF NEW JERSEY, *Appellee*.

[redacted]

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IN THE

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No. ———

EDWARD J. GARRITY AND EDWARD VIRTUE, *Appellants,*

v.

STATE OF NEW JERSEY, *Appellee.*

JAMES HOLROYD, EUGENE D. ELWELL AND DONALD MURRAY, *Appellants,*

v.

STATE OF NEW JERSEY, *Appellee.*

Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of New Jersey is reported at 44 N.J. 209, 207 A. 2d 689, and is reprinted herein as Appendix "A". The opinion in the

case of *State* v. *Holroyd*[1] is reported at 44 N.J. 259, 208 A. 2d 146, and is reprinted herein as Appendix "B".

JURISDICTIONAL GROUNDS

The New Jersey Legislature enacted in 1953 *N.J.S.A.* 2A:81-17.1 which provides:

> "Any person holding . . . employment (whether State, county or municipal), who refuses to testify upon matters relating to the . . . employment . . . upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself . . . shall . . . be removed therefrom or shall thereby forfeit his . . . employment and any . . . pension granted to him by any law of this State . . ."

Acting pursuant to this compulsory statute, an Assistant Attorney General of New Jersey demanded and received from appellants statements which were thereafter admitted into evidence during their trial. At the trial, and on appeal, defense counsel vigorously objected to the admission of any statements obtained under the coercive threat of this statute and challenged the constitutionality thereof.

Appellants, therefore, appeal from the final judgment of the Supreme Court of New Jersey which affirmed the trial court conviction by:

1. Avoiding the issue raised by defense counsel challenging the constitutional validity of state statute *N.J.S.A.* 2A:81-17.1; and,

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[1] The case of *State* v. *Holroyd* involves identical factual issues and questions of law. A Notice of Appeal to the United States Supreme Court was filed in the Supreme Court of New Jersey on June 11, 1965 and the record therein has been certified and filed in this Court. A consolidation of these two cases has been effected in order for the Court to simultaneously consider both appeals.

2. Sustaining the admission into evidence during trial, and over defense objection, statements obtained from defendants by this statutory coercion and gross misrepresentation of a material fact.

There is also the very substantial constitutional issue of whether the Supreme Court of New Jersey can engage in a non-judicial act; then, on appeal by convicted defendants, review its own non-judicial action. This question is first raised by this appeal because of the futility of raising such an issue in the courts below.

The question arises out of an order of the Supreme Court of New Jersey when, on June 30, 1961, it ordered the Attorney General of New Jersey to investigate alleged irregularities in the Municipal Court of the Borough of Bellmawr, Camden County, New Jersey. As a result of the court ordered investigation, appellants were indicted, tried and convicted of *conspiracy* to obstruct the administration of the New Jersey Motor Vehicle Traffic Laws.

An appeal was taken to the Appellate Division of the Superior Court of New Jersey. However, while this appeal was pending, and before argument, the Supreme Court of New Jersey, on its own motion, certified the case to its jurisdiction. The judgments of conviction, based upon the court-sponsored investigation, were then affirmed.

The judgment below for each appellant was entered September 26, 1963. Notice of Appeal to the Appellate Division of the Superior Court was filed October 23, 1963. The decision of the Supreme Court of New Jersey was rendered March 1, 1965.

This Court has jurisdiction pursuant to Title 28 USCA § 1257 (2).

The following cases sustain the jurisdiction of the Supreme Court in this appeal. *Dahke-Walker Milling Co.* v. *Bondurat,* 257 U.S. 282, *Slochower* v. *Board of Education,* 350 U.S. 551.

STATUTE INVOLVED

Official citation: Session Law 1953, Chapter 259, Page 1759, and cited as New Jersey Statutes Annotated (*N.J.S.A.*) 2A:81-17.1:

> "Any person holding or who has held any elective or appointive public office, position or employment (whether State, county or municipal), who refuses to testify upon matters relating to the office, position or employment in any criminal proceedings wherein he is a defendant or is called as a witness on behalf of the prosecution, upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this State which has the right to inquire under oath upon matters relating to the office, position or employment of such person or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself, shall, if holding elective or public office, position or employment, be removed therefrom or shall thereby forfeit his office, position or employment and any vested or future right or tenure or pension granted to him by any law of this State provided the inquiry relates to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for

election or appointment to any public office, position or employment in the State."

QUESTIONS PRESENTED

The questions presented are:

1. (a) Does *N.J.S.A.* 2A:81-17.1 violate the 14th Amendment when said statute compels holders of public office to give testimony about matters relating to their office where, if the office holders refuse to testify on the grounds of possible self-incrimination, they forfeit their office and pension rights and thereafter are permanently ineligible for election or appointment to any public office in the state?

(b) Does the 14th Amendment prohibit the admission in evidence during a criminal trial of statements obtained under *N.J.S.A.* 2A:81-17.1 which compels a defendant police officer to make the statement or be discharged from his employment?

2. Is it repugnant to constitutional guarantees of due process for the highest court of New Jersey, of its own motion, to order an investigation of an alleged law violation; refer the results of said investigation for prosecution; and, then, as the tribunal of last resort within the state, review the appeal of convicted defendants who were subjects of the original court-initiated investigation?

STATEMENT OF THE CASE

Appellants and one other, Helen B. Naglee, were all public employees of the Borough of Bellmawr, Camden County, New Jersey. Mrs. Naglee is now deceased and, therefore, not a party to this appeal. Edward J. Garrity was the Chief of Police of Bellmawr and Edward Virtue was a police officer of Bellmawr. Naglee was a clerk of the Municipal Court

of Bellmawr. The Supreme Court of New Jersey, of its own motion, entered an order on June 30, 1961, directing the Attorney General to conduct an investigation of alleged "ticket fixing" in the Borough of Bellmawr. The actual order is not of record in these proceedings. During the course of the investigation, the Attorney General's office developed a number of traffic violation tickets issued by Officer Virtue which were subsequently down-graded to a lessor charge. The down-grading allegedly was done with the concurrence of one or more of the defendants who were then indicted on a charge of conspiracy to obstruct the administration of the New Jersey Motor Vehicle Traffic Laws.

Garrity has been Chief of Police for 10 years and on the Bellmawr police force for a total of 15 years. Virtue has been on the Bellmawr police force for 8 years. Naglee has been clerk of court for 13 years. All have long tenure of service and have accumulated retirement pensions.

The Attorney General's office, acting pursuant to the statute which makes mandatory the loss of position and forfeiture of pension rights from any state employee who refuses to answer questions or give testimony on the grounds that it might incriminate them, demanded and obtained statements from Naglee, Virtue and Garrity concerning the down-grading of the traffic tickets.

After an extended investigation, the Attorney General, on behalf of the Supreme Court, referred the investigative results to the County Prosecutor of Camden County, New Jersey, for presentation to a Grand Jury. Thereafter, the County Prosecutor, together

with representatives of the Attorney General, and again acting pursuant to the statute in question, demanded and obtained statements from Naglee, Virtue and Garrity concerning the down-grading of traffic tickets. A true bill was rendered by the Grand Jury charging each of the three with conspiracy to obstruct the due administration of the Motor Vehicle Traffic Laws.

During the trial, the prosecution offered, over the vigorous objections of defense counsel, the statements obtained from each of the alleged co-conspirators. The trial court rejected defense counsel's objections and ruled that the statements were voluntarily and freely given and admitted the statements into evidence.

Defendants were all found guilty as charged on May 13, 1963, and on September 26, 1963, received a suspended three month sentence in the county jail on the condition that a $100 fine be paid. The fine has been paid and the defendants are not in custody.

Following the conviction of guilty by the trial court, defendants, on October 23, 1963, filed a Notice of Appeal to the Appellate Division of the Superior Court of New Jersey from the judgment of conviction. While this appeal was pending and before argument, the Supreme Court of New Jersey certified the appeal to its jurisdiction for hearing. The opinion of the Supreme Court of New Jersey was entered March 1, 1965.

In the state proceedings, counsel for defendants vigorously questioned the constitutionality of the statute *N.J.S.A.* 2A:81-17.1. This issue was ignored by the New Jersey Supreme Court.

I

(a) Does N.J.S.A. 2A:81-17.1 Violate the 14th Amendment When Said Statute Compels Holders of Public Office to Give Testimony About Matters Relating to Their Office Where, If the Office Holders Refuse to Testify on the Grounds of Possible Self-Incrimination, They Forfeit Their Office and Pension Rights and Thereafter Are Permanently Ineligible for Election or Appointment to Any Public Office in the State?

(b) Does the 14th Amendment Prohibit the Admission in Evidence During a Criminal Trial of Statements Obtained Under N.J.S.A. 2A:81-17.1 Which Compels a Defendant Police Officer to Make the Statement or be Discharged From His Employment?

These questions raise the issues of whether the statute is arbitrary and discriminatory; whether the drastic sanction which it imposes is, in fact, a bill of attainder; whether the element of psychological coercion, coupled with a deliberate misstatement of consequences by an interrogator, renders inadmissable statements obtained from defendants.

Following the hearings conducted by the late Senator McCarthy early in the last decade, many State Legislatures and municipalities enacted statutes and ordinances which prohibited their employees from invoking the guarantee against self-incrimination under penalty of loss of job if they asserted the privilege. A number of cases involving these statutes and ordinances have reached this Court with the result that there are now a variety of opinions relating to the right of State employees to invoke the constitutional privilege against self-incrimination.

The New Jersey statute is similar to those enacted in other states as it imposes, without benefit of hearing or judicial trial, severe sanctions upon its public employees for invoking the privilege against self-incrimi-

nation. This statute requires that the employee *shall* be removed from office, *shall* forfeit his pension rights and *shall* be prohibited from thereafter seeking elective office if he fails to testify for the reason that answers to questions may be self-incriminating.

The Congress of the United States enacted Public Law 769, 68 Stat. 1142, 5 U.S.C.A. 740d, of which Section 2(a) is similar to the New Jersey and other state statutes. (Appendix C) The validity of the Federal Act was considered by the Court of Claims in the case of *Steinberg* v. *U. S.*, 143 Ct. Cl. 1, 163 F. Supp. 590, with the result that the case law emerging therefrom holds that any statute passed by a Legislature applicable to public employees which inflicts punishment without providing for a hearing or a judicial trial is, in fact, a bill of attainder, prohibited by Article I, Section 10 of the Constitution. Punishment in the *Steinberg* case was denial of an annuity without due process. In the present case, the punishment is denial of employment without due process. Also from *Steinberg* is derived the rule that no Legislature can enact a statute which makes an employee's silence an admission that he has not fulfilled his public duty or obligation. Any statute which adopts such a procedure is declared to be lacking in the requirements of due process.

This Court, through prior decisions, guarantees protection to public employees when a statute affecting them is patently arbitrary and discriminatory, *Wieman* v. *Updegraff*, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216. Coupled with this is the recent decision of this Court which holds that State jurisdiction can no longer seek refuge in the fiction that the 5th Amendment guarantee against self-incrimination is not ap-

plicable to purely state matters, *Malloy* v. *Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653.

In *Cohen* v. *Hurley,* 366 U. S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 56, subsequently over-ruled by *Malloy* v. *Hogan,* Justice Douglas, in his dissent, would place on the State the burden of proving guilt if one asserts the constitutional privilege against self-incrimination. To paraphrase the Justice's language, he would hold that a statute does not meet the requirements of due process when it uses an employee's silence to brand him as one who has not fulfilled his duty or obligation. To take away a man's employment after many years of public service, to take away his accumulated pension and to forbid him from forevermore holding public office imposes a penalty so severe as to be a criminal sanction.

The constitutionality of this statute was raised by appellants before the Supreme Court of New Jersey. Rather than meet the validity issue, the court avoided its consideration on the basis that, because defendants were police officers, they would have been required to testify irrespective of the statute. No consideration was given by the court to the third defendant, Helen B. Naglee, who was not a police officer. The fact that appellants were police officers is immaterial. They were State officials and holding public office. This statute applies to all holders of public office in the State of New Jersey regardless of whether they be elected, appointed or civil servants. It groups all together regardless of their level of employment or the nature of their responsibilities.

In *Slochower* v. *Board of Education,* 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692, this Court held that the privilege against self-incrimination would be reduced

to a hollow mockery if its exercise could be taken as equivalent to either a confession of guilt or a conclusive presumption of perjury. *N.J.S.A.* 2A:81-17.1, as written, prejudges the guilt of one exercising the privilege against self-incrimination. The New Jersey Legislature has grouped the innocent with the guilty and imposes punishment regardless of guilt or innocence. Such a law is an indiscriminate classification of the innocent with the guilt and, therefore, is an assertion of arbitrary power, *Wieman* v. *Updegraff, Slochower* v. *Board of Education, Steinberg* v. *U. S.*

From the foregoing, it logically follows that any statement obtained from a defendant under the threat of a statute which imposes punishment; which is arbitrary and discriminatory; which is totally lacking in due process, cannot be said to have been freely and voluntarily made by the defendant.

The Supreme Court of New Jersey, when it considered the question of voluntariness of defendants' statements and their admissibility, undertook to consider whether defendants' wills were so over-borne as to critically impair their capacity for self-determination. The court then proceeded to examine only the physical circumstances existing at the time defendants' statements were taken. It held the statements to be voluntarily made and, therefore, admissible. The court then concluded that all statements are, to a degree, "coerced confessions" for the reason that virtually all confessions are accompanied by some degree of coercion.

Rarely does a court have the opportunity to review statements obtained from defendant police officers for usually the police officer is the villain who has obtained a statement under questionable circumstances from

others suspected of committing a crime. In this case, no question is raised about physical circumstances surrounding the taking of defendants' statements. True, the statement-taking extended over many hours but there is no charge of physical violence or other run-of-the-mill coercive tactics.

This case presents issues unique to the question of obtaining statements from individuals who were the principal subjects of an investigation. There had been a prolonged investigation of defendants involving the down-grading of traffic tickets. Defendants were all public employees and subject to the provision of *N.J.S.A.* 2A:81-17.1 which compelled them to testify. If they refused on grounds that the answer may tend to incriminate them, removal from employment and forfeiture of pension rights is mandatory.

During the investigation defendants were required to give statements. Assistant Attorney General Riggs, in taking defendants' statements, warned them as follows:

> "* * * I want to advise you anything you say must be voluntary, of your own free will, without threats or coercion or promise, or reward and anything you do say may be used against you or any person in a subsequent criminal proceeding, or proceedings, in the courts of our state. You do have under our statutes, as you may know, a privilege to refuse to disclose any information which may tend to incriminate you. However, if you make such a disclosure, with knowledge of this right and without coercion, you thereby waive this right or privilege with regard to any phase of this investigation. *This right or privilege that you have is limited to the extent that you as a police officer once sworn and asked questions pertaining*

to your office and your conduct therein, if you refuse to answer, you may then be subject to a proceeding to have you removed from the department." (Emphasis supplied.)

The emphasized portion of the warning is a gross misrepresentation of the statutory effect of defendants' refusal to answer. The statutory requirement is not permissive but mandatory and, in the event defendants refused to answer, they would be discharged from their jobs rather than *may* be subject to a proceeding to have them removed from their jobs. Likewise, this statute does not permit a removal hearing or "proceeding" as misrepresented by Riggs.

A common tactic of interrogating officers when obtaining confessions is to misrepresent the consequences of a subject's refusal to testify. The misleading inducement held out by the Assistant Attorney General is, in itself, sufficient to void the statement and render it inadmissible. No statement induced by fraud, trickery, or misrepresentation is admissable.

This Court must acknowledge that strong psychological coercion is sufficient to make involuntary a statement obtained from a defendant. In varying degrees this Court has recognized that a distinction exists between actual physical violence, mere threats of violence and depriving a defendant of some necessity prior to obtaining a statement. In *Haynes* v. *Washington,* 373 U. S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513, the act of not allowing a suspect to call his wife until he confessed was held sufficient to hold the confession inadmissible.

In the present case, the Court must consider the psychological factors which constitute the coercive

inducement to defendants to make statements. These were:

1. Defendants could not invoke the constitutional guarantee against self-incrimination for, if they did, they lost their jobs.
2. If the constitutional privilege is invoked they subject themselves to the inference of guilt.
3. For invoking the constitutional privilege a social stigma attaches and they lose the respect of the community.
4. There is a loss of economic security in that they are deprived of their positions and pension rights and their future employment opportunity is seriously curtailed.
5. Failure to answer is tantamount to conviction without a hearing.
6. Emotional stress will necessarily result from impairment of relationships with wife, children, relatives, neighbors, etc.

It is impossible to measure the psychological impact upon subjects or to decide its effect upon the mind of the subject. For this reason alone, any statement obtained under these circumstances must be considered involuntary.

The fact that there may be ample evidence of wrongdoing to convict defendants apart from the coerced confession, nevertheless, the admission in evidence, over objection, of the coerced confession violates the due process clause of the 14th Amendment and, therefore, voids the conviction, *Payne* v. *Arkansas,* 356 U. S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975.

Testimony obtained under a compulsive statute such as this cannot provide the origin for defendants' convictions. The State, after obtaining the testimony, is left with complete freedom to prosecute but it cannot use the statements obtained under the coercive statute. Instead, it must work up its own evidence against the defendant independent of the statements. It is the introduction of the defendants' statements during trial which is objectionable, not the fact that prosecution upon the subject matter of the testimony is allowed.

The statutory threat and its deliberate misrepresentation by the Assistant Attorney General are, therefore, sufficient to declare defendants' statements involuntary and not the product of their free will. The statute should be declared as violative of the 14th Amendment and defendants' convictions should be set aside.

II

Is It Repugnant to Constitutional Guarantees of Due Process for the Highest Court of New Jersey, of Its Own Motion, to Order An Investigation of An Alleged Law Violation; Refer the Results of Said Investigation for Prosecution; and, Then, as the Tribunal of Last Resort Within the State, Review the Appeal of Convicted Defendants Who Were Subjects of the Original Court-Initiated Investigation?

The basic issue in this question is whether any court which undertakes to act in a non-judicial capacity can, thereafter, review its own non-judicial act on appeal. This issue is considered so basic to our concept of justice and due process that it must be considered by the United States Supreme Court, even though the issue was not raised below.

Chief Justice Vanderbilt of the New Jersey Supreme Court, in *Massett Building Company* v. *Bennett*, 4 N.J. 53, 71 A.2d 327, reviews at length the many non-judicial

acts imposed upon the New Jersey judiciary by the State Legislature and recites the historical basis of the judiciary accepting from the Legislature the delegation of non-judiciary powers. This decision, however, recognizes and affirms the principle that judges and courts are not obliged to accept legislative grants of authority if such tasks interfere with the proper functioning of the court or involve the court in situations which might reflect on the court's reputation in the community for fairness, impartiality and independence. The question not considered in the *Massett* case is whether a judge or court which engages in a non-judicial act can thereafter review its own non-judicial act.

The factual situation existing preceeding the conviction of appellants and the procedure followed by the Supreme Court while defendants' appeal was pending demonstrates more than a routine interest in the outcome. On June 30, 1961, the Supreme Court of New Jersey issued an order directing an investigation of alleged irregularities in the Municipal Court of the Borough of Bellmawr, New Jersey. Pursuant to this order, an Assistant Attorney General of the State was assigned to investigate the altering of traffic tickets in the Borough of Bellmawr. Following this investigation, and presumably with the concurrence of the Supreme Court, the results of the investigation were referred to the Camden County Prosecutor for Grand Jury action.

The record does not contain the court's order for investigation; however, the language of the court in its opinion leaves no doubt that the investigation was under the auspices of the court and those conducting the in-

quiry were doing so as agents of the court. At page 692 of the Opinion, the Court says:

> "Deputy Attorney General Budd M. Riggs and Detective John F. Corbin of the New Jersey State Police Department, *who had been assigned pursuant to an order of this court* to investigate the altering of tickets in the Borough. . . ." (Emphasis added.)

And again at page 694 of the Opinion:

> "Assistant Attorney General Riggs, *as a result of an order issued by this court on June 30, 1961,* had begun an investigation of alleged irregularities of the Bellmawr Municipal Court . . ." (Emphasis added.)

The court's obvious interest in the outcome is clearly demonstrated by its subsequent action for, after appellants had perfected their appeal from the trial court to the Appellate Division of the Superior Court of New Jersey, the Supreme Court, acting on its own initiative, reached down for the case and by-passed the Appellate Division. In its own words, at page 691 of the Opinion. the court acknowledges this action in the following language:

> "We certified the matter on our own motion before argument in the Appellate Division."

A hypothetical parallel to what has happened would be if this Court decided that the Director of the Federal Bureau of Investigation was not properly discharging his responsibility and ordered an investigation of his conduct in office. The Attorney General, sharing the same belief and under the guise of the court's order, undertakes such an investigation and, thereafter, refers

the matter to the U. S. Attorney in Alabama for presentation of his findings to a Grand Jury which then returns an indictment. Could this Court, thereafter, in all fairness to the accused and under our constitutional system, review its own preconceived idea of wrongdoing?

Due process requires that every procedure in a matter of law must hold the balance nice, clear and true between the State and the accused and, if it does not, then there is a denial of due process, *Tumey* v. *Ohio,* 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749. This Court has also recognized the gross abuse which can result from the one man "judge-grand jury" as exemplified in the case of *In re Murchison,* 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942. In *Murchison,* Justice Black, speaking for the majority, stated:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very person accused as the result of his investigation.
>
> "A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand jury. Having been a part of that process, a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused . . . Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impressions of what had occurred in the grand jury room and his judgment was based in part on his impression, the accuracy of which could not be tested by adequate cross examination.
>
> "We hold that it was a violation of due process for the 'judge-grand jury' to try there petitioners . . ."

The issue thus raised by this question touches the very roots of the separation of powers in constitutional governments as established in the United States. The action of the Supreme Court of New Jersey offends the canons of deceny and fairness which we cherish. It acted as complainant, investigator, prosecutor and judge. Where then can defendants turn for help but to the Supreme Court of the United States? Under these circumstances, the Court should accept jurisdiction of this question.

CONCLUSION

Every public employee of the State of New Jersey is affected by the compulsory provisions of *N.J.S.A.* 2A:81-17.1. For this reason, it is respectfully submitted that the Court cannot escape the conclusion (1) that the questions presented are substantial, and (2) that the statute violates the due process guarantee of the 14th Amendment.

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